IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77–134

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA,
KROBLIN REFRIGERATED XPRESS, INC.,
and
SCHANNO TRANSPORTATION, INC.

Respondents.

BRIEF OF RESPONDENT KROBLIN REFRIGERATED XPRESS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether evidence presented by freight forwarders in support of motor carrier applications suffices to establish "public convenience and necessity" as

required by Section 207 of the Interstate Commerce Act [49 U.S.C. §307]?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited in the petition, the provisions in the Appendix herein also are relevant to this case.

STATEMENT OF THE CASE

The case below involved review of the decision by the Interstate Commerce Commission in Kroblin Refrigerated Xpress, Inc., Extension--Freight Forwarder Traffic, 123 M.C.C. 831, decided October 30, 1975 [Petition, pp. 10a-30a]. The Commission's report also embraced the application of Schanno Transportation, Inc., Extension--Freight Forwarder Traffic.

The Commission found public convenience and necessity to require operation by each motor carrier applicant. The

applications were supported by three freight forwarders and restricted to traffic moving on the forwarders' bills of lading, from and to the forwarders' facilities.

In addition to finding an inadequacy of existing service [Petition, p. 26a], the Commission also considered and found that the supporting freight forwarders were in need of access to reasonable line-haul rates for aggregate less-than-truck-load quantities of miscellaneous freight [Petition, p. 18a].

The Court below found not only substantial evidence in support of the findings of fact of the Interstate Commerce Commission [Petition, p. 8a] but also was in agreement with the conclusions of law "concerning the position of freight forwarders in the national transportation scheme" as found in Alterman Transport

Lines, Inc. v. United States, 361 F.Supp. 664 (M.D. Fla. 1973) [Petition, p. 9a].

Freight forwarders were shown to enjoy no special presumptions in their favor and to be proper parties to support an application for motor carrier authority [Petition, p. 24a]. Reference also was made to a line of cases back to 1954 in which the level of rates of motor carriers were considered to be so high as to constitute an embargo on traffic and to warrant and justify grants of motor carrier authority [Petition, p. 24a].

The Court below sustained the Commission's decision [Petition, pp. 3a-9a], holding that:

> "...we do not have to decide whether freight forwarders' support will alone suffice to uphold a carrier's application for certificate authority, because in this case the Commission paid careful attention to the inadequacy of service currently available to shippers over the routes applied for. The Commission also found, with substantial evidence, that 'the protestants [petitioners here] have refused to make any meaningful effort to negotiate suitable FAK rates with the supporting forwarders and have, thereby, demonstrated their lack of interest in the involved traffic.'" [Petition, p. 8a].

ARGUMENT

The question presented by petitioner is neither a substantial federal question nor a justiciable issue.

A. No Substantial Federal Issue

Freight forwarders are required by the statute [49 U.S.C. 1002(a)(5)] to use the underlying services of regulated motor common carriers, among other specified carriers, for terminal-to-terminal operations and forbidden by statute [49 U.S.C. 1018] from using other than those specified instrumentalities for the performance of such transportation between consolidation and break-bulk (terminal-

to-terminal) points [Appendix, p. 2a].

The concept of granting a certificate of public convenience and necessity to a motor carrier restricted to general commodity traffic moving on bills of lading of freight forwarders is not new. Cf. Globe Cartage Company, Inc., Common Carrier Application, 42 M.C.C. 547 (1943); aff'd, U.S. et al v. Hancock Truck Lines, Inc. 342 U.S. 774, 65 S.Ct. 1003, 89 L.Ed. 1357 (1945). Moreover, as shown, the Commission long has granted additional motor carrier authority when it finds the rates of existing carriers so high as to constitute an embargo [Petition, p. 24a].

Petitioner sought to submerge findings of inadequacy of service under those other findings pertaining to need for access to reasonable line-haul rates covering aggregate less-than-truckload quantities of miscellaneous freight [FAK rates]. As

the Court below found, the challenged decision does not rest upon the proposition of a need for freight forwarders to obtain rates low enough to allow them a reasonable profit. It rests on explicit findings of inadequacy of existing service as shown by the Court's recitation of the Commission's findings of the deficiencies in existing service [Petition, p. 8a].

B. The Question Presented Is Not Justiciable

Petitioner's question in the Court below was whether the Commission erred in issuing certificates of public convenience and necessity when the only evidence in support of the applications for such certificates consisted of proof that the services so authorized were needed by certain regulated freight forwarders. Petitioner's question herein is whether regulated motor carriers

are obligated to favor regulated freight forwarders with long-haul transportation service at rates low enough to enable forwarders to make a profit.

Petitioner sought below a review of the role of freight forwarders. The Court was cognizant of provisions committed to the Commission's authority by the Congress' defining the "public interest" role of freight forwarders and requiring the Commission to provide for the continuance of coordinated freight forwarder-motor carrier service [Petition, pp. 7a-8a].

Petitioner now poses before this Court a rhetorical question with an obvious answer implied. Use of the value term "favor" defines the answer sought.--It seeks to elicit a direct answer in support of petitioner's view. It is

neither a sound nor just question.

CONCLUSION

The granting of the two applications did not constitute a change from precedent or long-standing policy. Such action represented a settled course of action which embodied the Commission's informed judgment that, by granting those applications, it was carrying out a policy committed to it by the Congress.

Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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DATED: AUGUST 24, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of August 1977 served three copies each of the foregoing brief of respondent in opposition to the petition for writ of certiorari upon all parties, including counsel for petitioner and the Solicitor General, by mailing copies thereof to each such party via first class mail, postage prepaid.

Thomas R. Kingsley

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APPENDIX

APPENDIX

Statutory Provisions:

Section 409 [May 16, 1942, amended November 12, 1943; May 16, 1945, February 20, 1946, December 20, 1950.] [49 U.S.C. §1009.] Utilization by Freight Forwarders of Services of Common Carriers by Motor Vehicle.

(a) Nothing in this Act shall be construed to prevent freight forwarders subject to this part from entering into or continuing to operate under contracts with common carriers by motor vehicle subject to part II of this Act, governing the utilization by such freight forwarders of the services and instrumentalities of such common carriers by motor vehicle and the compensation to be paid therefor: Provided, That in the case of such contracts it shall be the duty of the parties thereto to establish just, reasonable, and equitable terms, conditions, and compensation which shall not unduly prefer or prejudice any of such participants or any other freight forwarder and shall be consistent with the national transportation policy declared in this Act: And provided further, That in the case of line-haul transportation between concentration points and break-bulk points in truckload lots where such line-haul transportation is for a total distance of four hundred and fifty highway-miles or more, such contracts shall not permit payment to common carriers by motor vehicle of compensation which is lower than would be received under rates or charges established under part II of this Act.

Section 418 [May 16, 1942, July 12, 1960.] [49 U.S.C. §1018.] Carriers the Services of Which Freight Forwarders May Utilize.

It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities of services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this Act; express companies subject to this Act; air carriers subject to the Civil Aeronautics ct of 1938, as amended; common carriers by motor vehicle engaged in transportation exempted under the provisions of Section 203(b)(7a) of this Act; common carriers by motor vehicle exempted under the provisions of Section 204(a)(4a) of this Act; common carriers by water engaged in transportation exempted under the provisions of Section 303(b) of this Act; the Alaska railroad; common carriers by water operating between Alaskan ports, and between those ports and other ports in the United States or common carriers by water operating between Hawaiian ports, and between those ports and other ports in the United States.